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FOR THE DISTRICT OF SOUTH CAROLINA

2006 MAY -5 A 8:43

Gabriel Randolph #248729,)	C. A. No. 2:05-2249-MBS-RSC
)	
Plaintiff,)	
)	
-versus-)	<u>REPORT AND RECOMMENDATION</u>
)	
Anna Redfearn, Inmate)	
Grievance Coordinator at)	
Evans Correctional)	
Institution; and Jon Ozmint,)	
Director of South Carolina)	
Department of Corrections,)	
)	
Defendants.)	

This civil rights action, brought by a state prisoner proceeding pro se and in forma pauperis pursuant to 42 U.S.C. § 1983¹, is before the undersigned United States Magistrate Judge for a report and recommendation on the parties' cross motions for summary judgement. 28 U.S.C. § 636(b).

The plaintiff, Gabriel Randolph, filed this action on August 11, 2005, against Anna Redfern, Inmate Grievance Coordinator at Evans Correctional Institution, and Jon Ozmint, the Director of

¹ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of Section 1983, titled a civil action for deprivation of rights reads in relevant portion: the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
42 U.S.C. § 1983.

the South Carolina Department of Corrections (SCDC). Randolph complained that his constitutional rights were violated when several grievances he attempted to file were returned to him unprocessed, and, as a result, defendant Redfern did not undertake an investigation of the matters which plaintiff attempted to grieve. Plaintiff acknowledged that Redfern indicated on the grievances that they were returned to him because he included more attachments with his grievances than is allowed by the SCDC Grievance Procedure. He asserts this was violative of the grievance procedure at the prison. He also asserted that, "I've wrote and file grievance on this and to SCDC Director Mr. Jon Ozmint & SCDC Grievance Branch No respond from either so I did this document of there action of violated my Due Process right." (sic). (Complaint at pp. 3, 4). Plaintiff seeks damages and injunctive relief.

The defendants filed an answer on October 3, 2005, and raised failure to exhaust administrative remedies as their second affirmative defense. On January 30, 2006, the defendants filed a motion for summary judgment based in part on Plaintiff's failure to exhaust his administrative remedies. On February 1, 2006, the plaintiff was provided a copy of the defendants' motion and was given an explanation of dismissal and summary judgment procedure as well as pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by Roseboro v.

Garrison, 528 F.2d 309 (4th Cir. 1975). The plaintiff filed a cross motion for summary judgment on February 14, 2006, which the defendants opposed on February 21, 2006. Hence, it appears consideration of the motions is appropriate.

SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(c), a district court must enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed. R. Civ. P. 56(c). To avoid summary judgment on a defendant's motion, a plaintiff must produce evidence creating a genuine issue of material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are

to be drawn in his favor." Anderson, at 255, 106 S.Ct. at 2513-14.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under the Prison Litigation Reform Act (PLRA), "No action shall be brought with respect to prison conditions² under § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "There is no doubt that the PLRA's exhaustion requirement is mandatory." Porter v. Nussle, 534 U.S. 516, 524 (2002). All available remedies must now be exhausted; those remedies need not meet federal standards, nor must they be plain, speedy, and effective.

Congress enacted the PLRA in an attempt to reduce the number of frivolous civil rights cases filed by prisoners. A plaintiff's failure to exhaust administrative remedies under § 1997e(a) before filing the lawsuit is an affirmative defense that

² The Supreme Court recently held that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter v. Nussle, 534 U.S. 516 (2002). Also, in Booth v. Churner, 523 U.S. 731, 121 S.Ct. 1819 (2001), the Supreme Court held that under § 1997e(a) a prisoner must exhaust his administrative remedies even when the relief the prisoner seeks (money damages) is not available in the prison grievance proceedings. Id. at 1825.

must be pled by the defendant. Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 681 (4th Cir. 2005).

The plaintiff has the burden of demonstrating that he had exhausted the prison grievance procedure or that administrative remedies were unavailable with respect to his claims before the date of the filing of his § 1983 action. See, Brown v. Tombs, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 119 S.Ct. 88 (1998).

FACTS

The facts either undisputed or according to the plaintiff as the nonmoving party, with all reasonable inferences drawn in favor of the plaintiff, are as follow. Plaintiff used the court's preprinted civil rights complaint form to bring his complaint. The form asks, "Did you file a grievance concerning the claims you are raising in this matter?" The plaintiff's sworn response was "yes" and he indicated that he filed grievances ECI-1631-05 and ECI-1472-05 about this matter and that the final institutional answer or determination was rendered on June 27, 2005.

Plaintiff attached grievance ECI-1472-05 to his complaint on which the Institutional Grievance Co-ordinator indicated, "I/M Randolph: Too many attachments! Returned to you unprocessed. You may resubmit with (1) attachment sheet. NLT 7-5-05." Likewise, the plaintiff attached grievance ECI-1631-05 to his complaint on

which the Institutional Grievance Co-ordinator indicated, "I/M Randolph: Your grievance again is being returned to you unprocessed because you have too many attachments."

DISCUSSION

A review of the record and relevant case law indicates that the matter should be dismissed without prejudice for plaintiff's failure to exhaust his administrative remedies.

It is undisputed that plaintiff filed first step grievances about the matter complained of here, but that those grievances were returned to him unprocessed because he included more than the single attachment allowed by the rules governing the prison grievance procedure. The plaintiff's response to the return of the grievances was not to resubmit them without too many attachments as he had been instructed, rather he filed the instant lawsuit. Still, the plaintiff mistakenly believes that he has complied with the PLRA's exhaustion requirement. The plaintiff is wrong.

To exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim. Pozo v. McCaughtery, 286 F.3d. 1022, 1025 (7th Cir. 2002). Thus, an inmate, such as the plaintiff here, must actually and strictly comply with the requirements of the administrative processes. Simply filing a grievance which does not conform with the prison's rules does not suffice. Huze v. Segarra, 217 F. Supp.


2d. 394, 396 (S.D.N.Y. 2002) (and cases cited therein). Further, the exhaustion requirement mandates that an inmate properly complete all steps of the administrative process available to him. McCoy v. Goord, 255 F. Supp. 2d. 233, 246 (S.D.N.Y. 2003); Santos v. Hauck, 242 F. Supp. 2d. 257, 259-60 (W.D.N.Y. 2003). In short, the defendants are entitled to dismissal of the complaint against them if an inmate fails to exhaust or only partially exhausts administrative remedies. Massey v. Wheeler, 221 F.3d. 1030, 104 (7th Cir. 2000).

Here it appears that the exhaustion requirement set forth by the PLRA was not complied with and the court is precluded from reaching the merits of the complaint.

CONCLUSION

Accordingly, for the aforementioned reasons, it is recommended that the complaint be dismissed without prejudice for failure to comply with the exhaustion requirement of the PLRA. All other motions should be deemed moot.

Respectfully Submitted,



Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

May 4, 2006

Notice of Right to File Objections to Magistrate Judge's "Report and Recommendation"
&
The Serious Consequences of a Failure to Do So

The plaintiff is hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within ten (10) days of the date of its filing. 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three days for filing by mail. Fed. R. Civ. P. 6. Based thereon, this Report and Recommendation, any objections thereto, and the case file will be delivered to a United States District Judge fourteen (14) days after this Report and Recommendation is filed. Advance Coating Technology, Inc. v. LEP Chemical, Ltd., 142 F.R.D. 91, 94 & n. 3, 1992 U.S. Dist. LEXIS® 6243 (S.D.N.Y. 1992). A magistrate judge makes only a recommendation, and the authority to make a final determination in this case rests with the United States District Judge. See Mathews v. Weber, 423 U.S. 261, 270-271 (1976); and Estrada v. Witkowski, 816 F. Supp. 408, 410, 1993 U.S. Dist. LEXIS® 3411 (D.S.C. 1993).

During the ten-day period, but not thereafter, a party must file with the Clerk of Court specific, written objections to the Report and Recommendation, if he or she wishes the United States District Judge to consider any objections. Any written objections must *specifically identify* the portions of the Report and Recommendation to which objections are made *and* the basis for such objections. Failure to file written objections shall constitute a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the United States District Judge. See United States v. Schronce, 727 F.2d 91, 94 & n. 4 (4th Cir.), *cert. denied*, Schronce v. United States, 467 U.S. 1208 (1984); and Wright v. Collins, 766 F.2d 841, 845-847 & nn. 1-3 (4th Cir. 1985). Moreover, if a party files specific objections to a portion of a magistrate judge's Report and Recommendation, but does not file specific objections to other portions of the Report and Recommendation, that party waives appellate review of the portions of the magistrate judge's Report and Recommendation to which he or she did not object. In other words, a party's failure to object to one issue in a magistrate judge's Report and Recommendation precludes that party from subsequently raising that issue on appeal, even if objections are filed on other issues. Howard v. Secretary of HHS, 932 F.2d 505, 508-509, 1991 U.S. App. LEXIS® 8487 (6th Cir. 1991). See also Praylow v. Martin, 761 F.2d 179, 180 n. 1 (4th Cir.) (party precluded from raising on appeal factual issue to which it did not object in the district court), *cert. denied*, 474 U.S. 1009 (1985). In Howard, *supra*, the Court stated that general, non-specific objections are *not* sufficient:

A general objection to the entirety of the [magistrate judge's] report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the [magistrate judge] useless. * * * This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. * * * We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error.

Accord Lockert v. Faulkner, 843 F.2d 1015, 1017-1019 (7th Cir. 1988), where the Court held that the appellant, who proceeded *pro se* in the district court, was barred from raising issues on appeal that he did not specifically raise in his objections to the district court:

Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review. * * * A district judge should not have to guess what arguments an objecting party depends on when reviewing a [magistrate judge's] report.

See also Branch v. Martin, 886 F.2d 1043, 1046, 1989 U.S. App. LEXIS® 15,084 (8th Cir. 1989) ("no de novo review if objections are untimely or general"), which involved a *pro se* litigant; and Goney v. Clark, 749 F.2d 5, 7 n. 1 (3rd Cir. 1984) ("plaintiff's objections lacked the specificity to trigger *de novo* review"). This notice, hereby, apprises the plaintiff of the consequences of a failure to file specific, written objections. See Wright v. Collins, *supra*; and Small v. Secretary of HHS, 892 F.2d 15, 16, 1989 U.S. App. LEXIS® 19,302 (2nd Cir. 1989). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections addressed as follows:

Larry W. Propes, Clerk
 United States District Court
 Post Office Box 835
 Charleston, South Carolina 29402